

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SOVEREIGN BANK, :
Plaintiff, : CIVIL ACTION
v. :
PARK DEVELOPMENT WEST, LLC, :
et al., :
Defendants : NO. 06-2603

MEMORANDUM AND ORDER

McLaughlin, J.

August 17, 2006

The plaintiff originally filed this case in the Pennsylvania Court of Common Pleas for Bucks County on May 3, 2006. On June 16, 2006, one of the defendants filed a notice of removal and the plaintiff subsequently filed a motion for remand. The motion for remand asserts that remand is appropriate because: (1) the notice of removal was filed more than thirty days after the first defendant was served; (2) all of the defendants did not properly consent to the notice of removal; and (3) the Court lacks subject matter jurisdiction. The Court concludes that this case should be remanded to the Court of Common Pleas because all of the defendants did not either sign the notice of removal or formally consent within thirty days of when service was effected on the last served defendant.

The seven defendants in this case are The Park Development West, LLC ("Park Development"), GF II/Palisades LLC

("GF II/Palisades") and Conrad Roncati Jr., Michael Caridi, Charles Cerullo, Joseph Rotunde and Richard Rotunde (collectively the "Roncati defendnats").¹ The Roncati defendants are represented by one set of attorneys and GF II/Palisades is represented by separate counsel.

There appears to be some dispute over when and if all of the defendants were served and the dates of service are not clear from the current record. According to the plaintiff, the following defendants were served on the following dates:

GF II/Palisades	May 8, 2006
Mr. Caridi	May 9, 2006
Park Development	May 23, 2006
Mr. Roncati	May 25, 2006

The plaintiff asserts that the other three defendants, Mr. Cerullo, Joseph Rotunde and Richard Rotunde were not served but that they filed an answer on June 22, 2006. The Roncati defendants and GF II/Palisades dispute the plaintiff's assertion that Park Development has been served, but otherwise generally agree with the plaintiff's representations as to when the defendants were served. The Court need not consider the issue of whether or not Park Development has been served, because either way, the Court concludes that remand is appropriate because GF II/Palisades did not properly consent to removal.

¹ Some of the answers that have been filed named some third party defendants which are not relevant to the Court's analysis of the plaintiff's motion for remand.

On June 16, 2006, Mr. Roncati filed a Notice of Removal which stated that "[a]ll of the properly joined and served defendants consent to this removal." However, counsel for the Roncati defendants was the only person to sign the notice of removal and none of the other defendants filed any formal and timely consent to the removal.

Generally, a defendant must file a notice of removal within thirty days of being served with the complaint. 28 U.S.C. § 1446(b). With some narrow exceptions that are not applicable here, the removal statute has been construed to require that all defendants who have been served with the complaint must consent to a notice of removal in a multi-defendant case. Lewis v. Rego Co., 757 F.2d 66, 68 (3d Cir. 1985).

At issue here is whether GF II/Palisades consented in a legally sufficient manner to the notice of removal filed by Mr. Roncati. Other courts in this district to consider this issue have held that a formal and timely consent is required and that a representation by one defendant in a notice of removal that states that other defendants consent is not, in and of itself, legally sufficient. For example, in Green v. Target Stores, Inc., 305 F. Supp. 2d 448 (E.D. Pa. 2004), one of the defendants filed a notice of removal and stated that the other defendants consented. The District Court held that "one defendant may not speak for another in filing a notice of removal." Although there

was some evidence that the other defendants did in fact consent, the District Court remanded the case because a timely official notice of consent was never filed. Green, 305 F. Supp. 2d at 449-51.

Similarly, in Morganti v. Armstrong Blum Manufacturing Co., No. 00-6343, 2001 U.S. Dist. LEXIS 2951 (E.D. Pa. Mar. 19, 2001), one of the two defendants filed a notice of removal and represented that the other defendant consented to removal. The District Court in Morganti nevertheless held that remand was appropriate because all of the defendants did not sign the notice of removal or file some timely written document indicating consent. The Court reached this conclusion even though an amended notice of removal was filed which was signed by both defendants, because the amended notice of removal was filed more than thirty days after the service of the complaint on both defendants. Morganti, 2001 U.S. Dist. LEXIS 2951 at *2-11.

Other decisions by district courts in this district have reached similar conclusions. See Southwick v. Yale Materials Handling Corp., No. 97-383, 1997 U.S. Dist. LEXIS 9183 at *4 (E.D. Pa. June 26, 1997); Olgletree v. Barnes, 851 F.Supp 184, 186, 190 (E.D. Pa. 1994); see also Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 3d § 3731 ("Ordinarily, all of the defendants in the state court action must consent to the removal and the notice of removal must be

signed by all of the defendants, although other forms of acknowledging consent may be acceptable.").

Here, the notice of removal did state that all defendants consented to removal, but it was only filed by Mr. Roncati and signed by counsel for the Roncati defendants. Even assuming that the other Roncati defendants formally consented when their counsel signed the notice of removal of a co-defendant, neither GF II/Palisades nor its representative signed the notice of removal and GF II/Palisades never independently filed any formal consent within the thirty day removal period of any defendant. Although the defendants have since represented that GF II/Palisades orally consented to removal and there is no evidence that they ever objected, other courts in this district to consider the issue have not found such actions to constitute legally sufficient consent. GF II/Palisades did file a brief on July 12, 2006, which stated that it affirmatively consented to removal, but this brief was filed well after the thirty day removal period had expired for even the last served defendant and therefore this consent was not timely.

The Roncati defendants have argued that this case should not be remanded based on what is essentially a technical defect in their notice of removal. The Roncati defendants did cite two district court cases from other circuits which state that remand is not appropriate so long as counsel for one

defendant represents in the notice of removal that all defendants consent to removal. See City of University City v. AT&T Wireless Servs. Inc., 229 F. Supp. 2d 927, 930 (E.D. Mo. 2002); Meyer v. ERJ, Inc., No. 96-143, 1996 U.S. Dist. LEXIS 3012 at *1-2 (N.D. Ill. Mar 12, 1996).²

The Court acknowledges that remanding this case to state court for a lack of a legally sufficient consent to the notice of removal may seem somewhat harsh, given that it appears that all necessary defendants did in fact consent in some manner to removal. However, the plaintiff filed state law claims against the defendants in state court. Even assuming that diversity jurisdiction exists, removal is a statutory right and the United States Court of Appeals for the Third Circuit has held that "[t]he removal statutes are to be strictly construed against removal and all doubts should be resolved in favor of remand." Boyer v. Snap-On Tools Corp., 913 F.2d 108, 111 (3d Cir. 1990)

² The Roncati defendants also cited to Harper v. AutoAlliance Int'l, Inc., 392 F.3d 195 (6th Cir. 2004). However, that case did not directly address the specific issue of whether one defendant's representation that all defendants consent to removal is sufficient to survive a motion for remand. Although the Harper Court noted that nothing in Rule 11 of the Federal Rules of Civil Procedure prohibited such a representation, the Court did not reach the issue of whether such a representation was sufficient to survive a motion for remand directly. Instead, the Harper Court concluded that even if a separate written concurrence was required, the other defendant filed an answer within thirty days of being served with the complaint which affirmatively consented to removal in writing. Harper, 392 F.3d at 201-02.

(internal quotations omitted). Given this instruction, the Court finds the other district court cases from this district which have held that each defendant, or their legal representative, must either sign the notice of removal or file some other timely formal consent persuasive. Thus, the Court will remand this case to the Pennsylvania Court of Common Pleas for Bucks County.³

An appropriate Order follows.

³ The defendants have also argued that because GF II/Palisades was served before Mr. Roncati, it could not sign the notice of removal or file some other formal consent because its thirty day removal period had expired. For the purposes of this decision, the Court has assumed that the last served defendant rule applies and that each defendant has a separate thirty day period to file a notice of removal. If the Court were to accept the defendants' argument and also apply the last served defendant rule, the effect would be to essentially defeat the rule of unanimity mandated by Lewis v. Rego Co., 757 F.2d 66, 68 (3d Cir. 1985), because earlier served defendants would not need to consent to the notice of removal. Thus, to the extent the last served defendant rule applies, all defendants can, and indeed must formally consent to the notice of removal. See, e.g., Brierly v. Alusuisse Flexible Packaging, Inc., 184 F.3d 527, 533 n.3 (6th Cir. 1999).

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Defendants	:	NO. 06-2603

ORDER

AND NOW, this 17th day of August, 2006, upon consideration of the plaintiff's Motion for Remand (Docket No. 9) the response in opposition filed by defendant GF II/Palisades, the response in opposition filed by the Roncati defendants, the plaintiff's reply, a supplemental brief filed by the Roncati defendants and the plaintiff's response as well as arguments presented on a telephone conference held on August 1, 2006 between the Court and counsel, IT IS HEREBY ORDERED that the plaintiff's Motion for Remand is GRANTED. This case is REMANDED to the Pennsylvania Court of Common Pleas of Bucks County.

BY THE COURT:

/s/ Mary A. McLaughlin
MARY A. McLAUGHLIN, J.